Supreme Court, U.S.
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In the
Supreme Court of the United States

October Term, 2001

In re K. MING ROSCHKE

Relator

PETITION FOR WRIT OF MANDAMUS

TO PRESIDING JUDGE OF THE SECOND
ADMINISTRATIVE REGION, STATE OF TEXAS

Cause Nos. 48,017-361 and 52,255-361, from the 361st Judicial District Court, Brazos County, State of Texas

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QUESTIONS PRESENTED

1. Whether Administrative Judge's denial of motion to recuse violated the Due Process Clause when Trial Judge had denied Relator an opportunity to be heard, and participated in Plaintiff's lawsuit against Relator.

2. Whether Relator would have adequate remedy by appeal.

3. Whether a writ of mandamus should be issued.

PARTIES TO THE PROCEEDING

Relator is K. Ming Roschke.

Respondents are Honorable Olen Underwood, Presiding Judge of the Second Administrative Judicial Region of the State of Texas ("Administrative Judge" herein); Mr. Dennis Mann, Plaintiff in Cause No. 48,017-361; Mr. Gary M. Poenisch, Defendant in Cause No. 52,255-361; and Mr. Scott A. Hoover, Defendant in Cause No. 52,255-361.

The Presiding Judge of the 361st Judicial District Court of the State of Texas is Honorable Steve Smith ("Trial Judge" herein).

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PETITION FOR A WRIT OF MANDAMUS

Relator K. Ming Roschke respectfully prays that a writ of mandamus be issued directing Administrative Judge to grant recusal and assign another Judge to hear Cause No. 48,017-361 and Cause No. 52,255-361 in the 361st District Court of Texas for the reason that Trial Judge had deprived Relator an opportunity to be heard and participated in Plaintiff's lawsuit against Relator in violation of the Due Process Clause. Relator cannot obtain relief in any other form or from any other court.

OPINIONS BELOW

The federal questions were raised before Administrative Judge by a motion to recuse, which was denied on February 27, 2001 (App., *infra*, 1a). The federal questions were also raised in the Fourteenth Court of Appeals of Texas by petition for a writ of mandamus, which was denied on April 3, 2001, in an unpublished opinion (App., *infra*, 2a). The federal questions were also presented to Texas Supreme Court by petition for a writ of mandamus; the petition was denied without an opinion on May 30, 2001 (App., *infra*, 3a). A motion for rehearing was timely filed with Texas Supreme Court; the motion was denied without an opinion on July 19, 2001 (App., *infra*, 4a).

JURISDICTION

This Court has jurisdiction to grant a writ of mandamus pursuant to 28 U.S.C. §1651 to safeguard constitutional right under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Exceptional circumstances warrant the exercise of this Court's discretionary power, and

that Relator cannot obtain adequate relief in any other form or from any other court.

CONSTITUTIONAL PROVISION AND STATUE INVOLVED

The Fourteenth Amendment to the U. S. Constitution provides in relevant part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. §1651 (a) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

On October 6, 1998, Plaintiff Dennis Mann filed suit (Cause No. 48,017-361) against Relator for declaratory judgment based on a representation contract. Relator counterclaimed for frivolous lawsuit, fraud, and defamation, and moved trial court for leave to file a third-party action[1] against Mr. Gary M. Poenisch and Mr. Scott A. Hoover for interference of contract. The motion for leave was denied which necessitated a separate lawsuit (Cause No. 52,255-361) for interference of contract.

I. *Ex Parte* Communications by Plaintiff

In Cause No. 48,017-361, Relator alleged in pretrial motions (App., *infra*, 14a-25a) that between April 7, 1999, and October 29, 1999, Plaintiff had filed pleadings and

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[1] *Texas Rules of Civil Procedure*, Rule 38 (App., *infra*, 5a).

documents with trial court without serving Relator with a true copy, and informing Relator of the filing, in violation of *Texas Rules of Civil Procedure*, Rule 21[2] and Rule 13[3], for which Rule 215.2(b)[4] provides remedies, including sanctions.

II. *Ex Parte* Orders Obtained by Plaintiff

In Cause No. 48,017-361, the docket sheet (App., *infra*, 10a) indicates that on May 24, 1999, Plaintiff's counsel Mr. Bernard Buecker telephoned trial court and obtained an *ex parte* order; and on November 7, 2000, Trial Judge granted *ex parte* request by Mr. Poenisch (Mr. Poenisch's testimony, *infra*, 21-22), and reset Relator's scheduled hearing from November 17, 2000 (App., *infra*, 35a-36a), to November 21, 2000, (App., *infra*, 10a).

III. Hearing Requested by Relator

In Cause No. 48,017-361, the court file shows that Relator had requested a hearing for pretrial motions one[5] and three[6] on November 9, 1999 (App., *infra*, 28a), and for

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[2] *Texas Rules of Civil Procedure*, Rule 21 (App., *infra*, 6a).

[3] *Texas Rules of Civil Procedure*, Rule 13 (App., *infra*, 7a).

[4] *Texas Rules of Civil Procedure*, Rule 215.2(b) (App., *infra*, 8a-9a).

[5] Motion one was authorized by *Texas Rules of Civil Procedure*, Rule 215 (App., *infra*, 8a-9a) concerning a motion to strike Plaintiff's amended pleading, which contains a new cause of action without Relator's knowledge, in violation of *Texas Rules of Civil Procedure*, Rule 21 and Rule 13 (App., *infra*, 6a-7a).

[6] Motion three was authorized by *Texas Civil Practice and Remedies Code*, § 10.001 and §10.002 concerning frivolous lawsuit (App., *infra*, 26a-27a).

motion two[7] on November 12, 1999 (App., *infra*, 29a). The pretrial motions had been set for a hearing on January 6, 2000 (App., *infra*, 10a), but were continued by Mr. Poenisch's request (Mr. Poenisch's testimony, *infra*, 21-22).

On January 11, 2000, Relator requested a hearing for the pending motions as soon as possible (App., *infra*, 30a). On February 1, 2000, Relator requested a hearing as required by Rule 38 (App., *infra*, 5a; 31a). On May 11, 2000, Relator specifically informed Trial Judge that Relator had a time constraint under the statute of limitation and was in need of a hearing (App., *infra*, 32a) as required by *Texas Rules of Civil Procedure*, Rule 38 (App., *infra*, 5a). On September 18, 2000, Relator again requested a hearing (App., *infra*, 34a).

On September 27, 2000, trial court set a hearing for "All Motions Pending Before the Court" to be heard on November 17, 2000 (App., *infra*, 35a-36a). On November 7, 2000, Trial Judge granted Mr. Poenisch's *ex parte* request (Mr. Poenisch's testimony, *infra*, 21-22) and reset the hearing to November 21, 2000 (App., *infra*, 10a).

IV. Due Process Clause Disregarded

At the hearing for Relator's motions on November 21, 2000, Trial Judge denied Relator an opportunity to present motions one, two and three; participated in the litigation for Plaintiff by conducting direct and cross-examination against Relator; and assisted and advised Plaintiff on defensive issues.

---

[7] Motion two was also based on *Texas Rules of Civil Procedure*, Rule 215 (App., *infra*, 8a) to reset a trial date which Plaintiff had obtained *ex parte* without Relator's knowledge and participation, in violation of Rule 21 (App., *infra*, 6a-8a).

After the hearing, the docket sheet recorded: "11 21 00 motn hd as filed, ruling made;...." (App., *infra*, 11a).

V. Motion to Recuse

On November 30, 2000, Relator filed a motion to recuse pursuant to *Texas Rules of Civil Procedures*, Rule 18a and Rule 18b (App., *infra*, 37a-38a) in both Cause No. 48,017-361 and Cause No. 52,255-361 on grounds that Trial Judge had exhibited actual bias, and had deprived Relator of due process. In both causes, Trial Judge declined to recuse himself; but forwarded only the motion to recuse in Cause No. 48,017-361 (App., *infra*, 39a-44a) to Administrative Judge, and did not forward the motion to recuse in Cause No. 52,255-361[8] for a ruling as mandated by *Texas Rules of Civil Procedure*, Rule 18a (d) (App., *infra*, 37a).

On February 27, 2001, Administrative Judge heard the motion to recuse in Cause No. 48,017-361; admitted into evidence the transcript of the November 21, 2000, hearing; took judicial notice of the content of the court file; but denied the motion to recuse on the ground that it was not supported by the evidence (App., *infra*, 1a).

On March 29, 2001, Relator filed petition for a writ of mandamus with the Fourteenth Court of Appeals of Texas based on due process violations. On April 3, 2001, the Fourteenth Court of Appeals denied the petition and held:

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[8] Administrative Judge did not hear the motion to recuse in Cause No. 52,255-361 as it had not been forwarded to him by Trial Judge as required by law (App., *infra*, 37a). The non-forwarding issue had been raised in both the Fourteenth Court of Appeals of Texas and the Texas Supreme Court in petitions for writ of mandamus.

"Relator has an adequate remedy at law, and mandamus would be improper." (App., *infra*, 2a).

On May 15, 2001, Relator filed a petition for writ of mandamus with Texas Supreme Court based on due process violations. On May 30, 2001, Texas Supreme Court denied Relator's petition without an opinion (App., *infra*, 3a), for which Relator timely filed a motion for rehearing. On July 19, 2001, Texas Supreme Court denied the motion for rehearing without an opinion. (App., *infra*, 4a).

Relator cannot obtain relief in any other form or from any other court.

REASONS FOR GRANTING THE PETITION

The Due Process Clause guarantees a defendant an opportunity to be heard and to have an impartial judge in judicial proceedings. An individual's right to due process and the public's confidence in the judiciary are of paramount importance in our free society. Texas is one of the largest states in the United States; civil and criminal cases are heard almost daily. As shown herein, Texas courts have exercised judicial duties in ways that are in conflict with the Due Process Clause and relevant decisions of this Court. Granting of mandamus will not only uphold the Due Process Clause, but also give guidance to Texas courts, and benefit all litigants in Texas.

Mandamus is warranted because Administrative Judge's denial of motion to recuse was a clear abuse of discretion, for the evidence indisputably shows that Trial Judge had exhibited actual bias by denying Relator an opportunity to be heard and by participating in the litigation against Relator as advocate and adviser for Plaintiff.

Mandamus is justified because Relator would have no adequate remedy by appeal, and no alternative means to obtain relief.

I. MANDAMUS IS WARRANTED BECAUSE TRIAL JUDGE DISREGARDED THE DUE PROCESS CLAUSE

This Court has held that under the Due Process Clause, a person is entitled to be heard, *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976); to have a neutral judge in both civil and criminal cases, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed. 2d 182 (1980); and that the right to procedural due process is absolute, *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978).

The record shows that at the February 27, 2001, hearing for the motion to recuse, Relator presented the following due process issues and evidence before Administrative Judge:

> "MS. ROSCHKE: Your Honor, at the outset I wanted to state that a motion to recuse the judge is a very serious motion. It is not filed or brought out of disrespect, and it is for necessity that a fair trial might be obtained in this case.
>
> I was brought in this lawsuit as the Defendant by the Plaintiff, Dennis Mann ....
>
> As the Defendant, I have filed counterclaims. The major issue[s are] fraud, malice, and bad faith.
>
> Now, this case was filed by the Plaintiff in 1998. And on November 21st, 2000, that was the first hearing that the judge had for both parties being present before the judge. The hearing was requested by me. It was for the motion for the Movant, and it

was first requested in November on November 9th, 1999, over a year ago. So after a year later, the hearing was set and we were before the judge.

In this motion I have submitted a brief and I have analyzed the facts of that transcript for that motion for that hearing and also the applicable law for the judge's convenience. And I have here, also, marked Defense Exhibit 1 and 2, which I will tender and offer as evidence for this motion.

Basically the motion is based on three grounds. These are original transcripts by the court reporter concerning that. The motions are based on three grounds: No. 1 is the judge should be recused because due process was not given during the hearing; that the Movant was not allowed opportunity to present the motion on its merits.

Your Honor, I offer Defense 1 and 2 in evidence for this hearing.

....

THE COURT: All right. Thank you. The objection is overruled. It will be admitted.

(Defendant's Exhibit Nos. 1 and 2 admitted.)

MS. ROSCHKE: Thank you, your Honor. The motion is based on three grounds, your Honor. Number one, is based on the most important thing, is due process because it has been ruled by the U.S. Supreme Court and Texas court that when a party is not allowed to be given equal opportunity to present the case on the merits, that the impartiality issue would be heightened to a constitutional level and that disqualification would become a constitutional qualification. That's ground number one.

Number two, is that the judge has a personal bias or prejudice concerning the subject matter of the case and also concerning the Plaintiff. And I would later on discuss how that was.

Number three, is that according to Rule 18 (B) (2) (a) that the judge['s] impartiality might reasonably be questioned.

Concerning the due process argument, I have the facts and the law set out at length in a brief, and I do not want to repeat here. And I think the Court needs to examine the transcript and to understand exactly what had transpired to make the ruling.

But I would like to point out that at the hearing, the judge expressed firmly an opinion without allowing Movant to be heard or without allowing all the facts to be heard that this case is about money. But as supported by the pleading, this case is about fraud, malice, and bad faith.

And when fraud, malice, and bad faith are involved, the finding of the truth, the determination of the truth is just as important as the need for justice itself.

And there are a lot of damages or a lot of relationships that could be affected by fraud, malice, and bad faith that no money could ever compensate or restore. And for the judge without hearing all the facts to make that firm opinion is a personal prejudice about the subject matter.

Prejudice is defined by the dictionary as the judgment or opinion without knowing all the facts. And for that basis, I believe that Rule 18 (B) (2) (b) support[s] the recusal of the judge because he has a firm belief that this is about money.

And also during the hearing, the judge participated as the advocate for the Plaintiff. He conducted direct examination for the Plaintiff for the Plaintiff's benefit, as shown in the transcript. He also actively participated to cross-examine the Movant for the Plaintiff's benefit.

He also supplied his own personal information, essentially as a witness, about how – when he was practicing law and how he signed certificates and he would fax a copy of the pleading to the other side.

Those – although they're all valid – but when he participated as a litigant for the benefit of one party, the impartiality issue comes alive. And also under Section 18 (B) (2) (b), it says that when a judge has a personal bias for a party, the judge ought to be recused.

The United States Supreme Court said that a neutral and impartial judge is constitutionally required. When a judge participated in the litigation arena for one party, the judge necessarily would become interested for the benefit of one party. When the judge is interested, then judge cannot be neutral. And if the judge is not neutral, he cannot be impartial. And that is the constitutional ground, your Honor.

And also according to the Texas Supreme Court, it says that in evaluating impartiality, the reasonable person standard would be applied. That means if a reasonable person from the general public on the street, knowing the facts surrounding the case, would have a reasonable doubt, that the judge might not be impartial.

And I submit to the Court that a reasonable person from the street would expect that if he's a Defendant

in court, he would be given a fair opportunity to be heard at the time when his case is scheduled for hearing. And he would expect that the judge would not assist one party by conducting direct examination or cross-examination for the benefit of the other party.

He probably would expect the judge would not testify or supply personal information for the benefit of their party.

....

MS. ROSCHKE: According to the transcript as also discuss[ed in] my brief, the judge also participated to assist the Plaintiff in different ways. He assisted the Plaintiff in causing the Movant to disclose probative admissions so as to inform the Plaintiff about probative admissions that could be used in a case. He also assisted the Plaintiff to advise him as to how to answer interrogatories. He also told them that the statute of limitations can be used as a defense.

And there are other surrounding facts, such as ex-parte communication. There were two ex-parte orders in this case that were granted. Although, they're not major. I'm not making a big thing about the substance of those. But they were without my participation, without prior knowledge and opportunity to be heard, and those are also inappropriate.

The totality of what had happened in the case is supported by the record, and also the transcript shows that the judge ought to be recused on the constitutional grounds and also pursuant to Rule 18 (B)(2). Essentially this is my case, and I would offer my brief and also the transcript for the Court's

examination on that." (SF. Vol. I, 2/27/2001, p. 5-12).

Administrative Judge also took judicial notice of the content of the court file as evidence:

"THE COURT: ...I'm going to take judicial notice of the content of my file." (SF. Vol. I, 2/27/2001, p. 26).

A. Due Process: Opportunity to be Heard

The transcript of the November 21, 2000, hearing, which had been admitted into evidence, shows that Trial Judge had deprived Relator of an opportunity to be heard and blocked Relator's proof as follows:

"THE COURT: All right. Let me see if I can move things along.

Ms. Roschke, I understand you filed a Motion for Sanctions for violations and for frivolous pleadings. I don't see any way I can rule on those until I've heard all the evidence in the case. Therefore, motions one, two and three are not going to be heard today because I cannot make a decision until – ....

THE COURT: All right. Very well. .... So that takes care of one, two, and three....." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 10).

"MS. ROSCHKE: ...

...your Honor, I urge the Court to allow me to present motion one and two even if the Court does not want to hear motion number three.

THE COURT: Motion one and two at this point in time are not going to be heard, Ms. Roschke.

Okay?...." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 11-13). ....

"MS. ROSCHKE: Your Honor, if I will be allowed to be heard, you may feel differently. I would like to have an opportunity to be heard. I think this case warranted – I would limit it to a short time, maybe half an hour or so.

THE COURT: No. At this point in time, I'm denying that request....." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 12-13).

Although Relator did not have an opportunity to present the motions, after the hearing, the docket sheet recorded:

"11 21 00 heard motn as filed; rulings made; counsel to provide orders...." (App., *infra*, 11a).

Yet, as shown by the transcript, in actuality, Relator did not have a chance to present the motions, and Relator's motions had not been heard as filed.

This Court has maintained that under the Due Process Clause, a hearing must be a real one, not a sham or a pretense. *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

Based on the transcript of the hearing and the docket sheet, it is indisputable that Trial Judge had disregarded the Due Process Clause. Administrative Judge should have granted the motion to recuse.

B. Due Process: Right to an Impartial Judge

The evidence shows that Relator had been deprived of an impartial judge as follows:

1. Trial Judge Participated in Litigation Against Relator

The transcript of the November 21, 2000, hearing shows that Trial Judge had entered into the litigation arena as an advocate for Plaintiff by conducting direct and cross-examination against Relator, by supplying his own personal information on the subject matter in controversy[9] against Relator, by blocking Relator's proof, and by leading Relator's response to support Plaintiff's position:

"MS. ROSCHKE:....

> This is part of my – the major motion for today is to address that issue.
>
> May I be heard on that issue?
>
> [*Instead of allowing Relator to be heard, Trial Judge turned to Plaintiff's counsel to solicit probative information for Plaintiff; comment added.*]
>
> THE COURT: Did you send a May 4th amended petition to her?
>
> MR. BUECKER: Your Honor, I thought we did....
>
> MR. POENISCH: Judge, it's just five lines....
>
> THE COURT: Did you eventually get it?
>
> MS. ROSCHKE: As of today, no. I have gotten a copy from the clerk's office after Mr. Poenisch sent me a letter wanting $1800 from me to pay for his work. And I had to go downstairs to make a copy for myself to file for this motion."

---

[9] The subject matter in controversy concerns Plaintiff's filing of an amended pleading against Relator without informing Relator in violation of *Texas Rules of Civil Procedure*, Rule 21 (App., *infra*, 6a).

[*Trial Judge then participated in supplying his own personal information on the subject matter in controversy for Plaintiff's benefit; comment added.*]

THE COURT: Well, let me just give you my thoughts on that. As a lawyer who practiced civil litigation for 17 years before I came up here to work, there were occasions on which I mistakenly forgot to send people documents that I signed certificate of service for.

There were occasions on which people signed certificates of service to me that they didn't send them. There was never an occasion that I can recall that I didn't feel comfortable in picking up the phone and calling the other lawyer and saying, other lawyer, I'm missing page 3; other lawyer, you didn't send me a copy; other lawyer, please do that.

The filing of a Motion for Sanctions for other offensive motions before you have taken every reasonable step to try to get that resolved without that borders on conduct for which I would not like to be responsible.

MS. ROSCHKE: May I respond, your Honor to add some information?

[*Instead of allowing Relator to be heard, Trial Judge cross-examined Relator to block Relator's proof; comment added.*]

"THE COURT: Did you pick up the phone and call them and ask them to send you a copy?

MS. ROSCHKE: I did not know about it until November 3rd, which I got a copy from the Court immediately.

THE COURT: Well, how did you know on November 3rd that there was a copy?

MS. ROSCHKE: He sent me a letter saying we had filed an amended petition. I have the letter here, your Honor."

[*Instead of allowing Relator to be heard fully, Trial Judge turned to counsel for Plaintiff to solicit more favorable information for Plaintiff; comment added.*]

THE COURT: You have a fax that showed you tried to send it to her?

MR. BUECKER: It's on the certificate of the document itself and it's signed – the letter with a paralegal, a young lady that just graduated from paralegal school.

MR. POENISCH: Judge, the answer is "yes," we have a copy of the fax that was –that she gave to us. And that fax has the first page of the amended petition and the second page. And when she filed –

THE COURT: Does it say Fourth Amended Original Petition on the front?

MR. PEONISCH: Yes, it does, Judge. It's the second, I think. And the significance, Judge, is that I looked at these. I didn't understand that Ms. Roschke was trying to say that she didn't get a copy of it. It was like a proofreading problem. Then I realized that the top five lines did not come through on the second page of the fax. Sometimes that happens with the paper the way it feeds.

[*The record shows that Trial Judge then witnessed for Plaintiff's benefit; comment added.*]

THE COURT: It happens with stuff we get faxed to us all the time.

MR. POENISCH: And I would have sent her a second page but she already said she had it.

[*The Judge then cross-examined Relator to limit Relator's information for Plaintiff's benefit; comment added.*]

THE COURT: Ms. Roschke, as an officer of the Court, are you telling me that you didn't get faxed a document that he says he faxed to you that said Second Amended Original Petition?

MS. ROSCHKE: I am telling the Court under oath, if I have to, that I did not get a true and correct copy.

THE COURT: That's not what I asked, Ms. Roschke. Let me ask you again: Did you get what seemed to be a try to give you a Second Amended Original Petition?

MS. ROSCHKE: Your Honor, I have –

THE COURT: That is a "yes" or "no" answer.

MS. ROSCHKE: I have something faxed to me, which is different from the amended petition. I can show the Court if the Court is interested.

THE COURT: Did you have something – I'm having a hard time getting an answer, Ms. Roschke. Let me ask it again: Did you get a document sent to you that somewhere on it said Second Amended Original Petition?

MS. ROSCHKE: It said amended Petition for Declaratory Judgment and Damages. It was not signed, had nothing else on it, no certificate of service. And the next day I sent him a letter saying that your draft is not signed, and I was

warning him that this does not apply to this case. And I had never been told that this has been filed with the Court on May 4th.

And I have a copy of this draft here, your Honor, showing exactly what I received, which is different.

[*The Judge did not receive the draft from Relator; comment added.*]

THE COURT: Well, if I – if I buy in to this tit for tat, then I'm encouraging you to engage in the conduct that you-all say you are engaging in. Denied...." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, 43-47).

[The Judge then terminated Relator's right to be heard and blocked Relator's proof. Comment added.]

"THE COURT: The pleading is alive, and it will be used. No one may be heard. No one's rights have been violated...." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 50).

By conducting direct and cross-examinations for Plaintiff, and by supplying his own information to support the position of Plaintiff, Trial Judge had entered into the litigation arena for the benefit of Plaintiff. Having participated in the litigation, Trial Judge had become interested and was not neutral. Administrative Judge should have granted the motion to recuse.

2. Disparate Treatment at Presentation of Evidence

The transcript shows that while Trial Judge disallowed Relator an opportunity to be heard, he allowed Plaintiff, who had not requested the hearing, to present evidence fully:

"MR. POENISCH: .... And we have, your Honor, the – there is a pretty concise picture of the – of this case can be seen by the letters that were written back and forth between Mr. Mann and Ms. Roschke; and I would like to present those for the Court at this time.

THE COURT: Are they exhibits?

MR. POENISCH: They are marked as exhibits.

MS. ROSCHKE: Your Honor. May I have a chance to look at those first?

[*The record shows no response from the Judge; comment added.*]

MR. POENISCH:....These documents were – are part of her file that were produced to us....

In addition, there was – the last page is a copy out of her deposition; ...

I would like to offer those documents into evidence. That would be Plaintiff's Exhibit 3 through 10.

MS. ROSCHKE: Your Honor, may I respond?

THE COURT: (Nods head.)

MS. ROSCHKE: Since he's allowed to be submitting evidence to the Court, may I also submit my evidence that I prepared to present today? I think it would be very helpful to the Court related to the issue.

[*The record shows no response from the Judge; comment added.*]

MR. POENISCH: Judge, if I could get a ruling on the admissions, I could briefly, quickly summarize the significance of the documents. And the reason I'm

submitting them was this issue going to the Motion to Leave and the dates that are in the documents about the termination of the contract.

MS. ROSCHKE: Your Honor, I would also like to present evidence relating to these letters.

[*The record shows no response from the Judge; comment added.*]

MR. POENISCH: Well, that – I would have to see the documents.

MS. ROSCHKE: I would like to play the telephone ultimatum for the Court, very short message, probably take about one minute or maybe 50 seconds. (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 28-29).

[*After Relator's third urging, Trial Judge allowed the very short, telephone message (SF. Vol. II, 2/27/2001, Defendant's Exhibit 2, p. 2) to be played, while Plaintiff was allowed to present all of their exhibits; comment added.*]

THE COURT: All right. I'll admit Plaintiff's 2 (sic) through 10, and I'll allow the telephone message to be played." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 29).

The Judge's disparate treatments violated Relator's right to a fair hearing. The hearing was requested by Relator, and was scheduled for Relator's motions. While Trial Judge did not allow Relator an opportunity to present the motions, Trial Judge allowed Plaintiff to present evidence fully. Relator's telephone message was allowed only after three urgings, and only as rebuttal evidence to Plaintiff's exhibits. The hearing had become Plaintiff's presentation while Relator, who was the movant and had requested the hearing, was not allowed

an opportunity to develop proof for the motions, and was not afforded equal opportunity to be heard.

3. Trial Judge Advised Plaintiff on Discovery

The transcript shows that Trial Judge assisted Plaintiff as to how to answer interrogatories against Relator:

> "THE COURT: Obviously there is language that says, subject to the previous objections, you know, I would answer thus. That's what I think you need to do.
>
> MR. POENISCH: Thank you for that clarification, your Honor. And that will be done by December 15th...." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 41).

4. Ex Parte Communications by Plaintiff Allowed

Relator's motion one (App., *infra*, 14a-19a) and motion two (App., *infra*, 20a-22a) concern pleadings and letters that had been filed by Plaintiff with trial court without Relator's knowledge. At the February 27, 2001, hearing before Administrative Judge, Plaintiff's counsel Mr. Poenisch testified as to the *ex parte* communications:

"CROSS-EXAMINATION BY MS. ROSCHKE:

> Q. Mr. Poenisch, how many times have you contacted Judge Smith's office without me also knowing about the fact that you contacted the judge's office?
>
> A. You know the exact number, I don't keep track of. I know that the contacts that I've had with Judge Smith's office dealt with settings for hearings. And so –
>
> Q. Can you describe each of those contacts?

A. I can describe the ones that were made the subject of the hearing, and that was concerning the setting for your motions on November 17th. And at that time I conferred with Mr. Buecker....

Q. And why did you [not] also call me to have a conference call without – just having you and the Court discuss the matter?

A. Well, I first called you to see if we could get it reset to the 21st; and you said you refused to give that reset and you wouldn't give me a reason why.

Q. Did I not tell you that because of the last continuance that I agreed to give you, it caused the hearing to delay for about a year?

A. No, you didn't tell me that. You told me you had agreed to a previous continuance and would not agree to any further." (SF. Vol. I, 2/27/2001, p. 22-23).

5. Ex Parte Orders Granted for Plaintiff

The docket sheet (App., *infra*, 10a-11a) recorded that there had been two *ex parte* court orders granted for Plaintiff without Relator's prior knowledge and participation. The first one occurred on May 24, 1999, when Plaintiff's lead counsel Mr. Bernard Buecker telephoned trial court *ex parte*. The docket sheet recorded in relevant part:

"5 24 99 Mr. Buecker called indicating parties have agreed to tender the funds unto the court. Ordered" (App., *infra*, 10a).

Upon learning of the *ex parte* communication, on May 25, 1999, Relator expressly requested Trial Judge not to enter agreed orders without the parties' joint signatures (App., *infra*, 12a-13a).

The second *ex parte* court action occurred, as shown by Mr. Poenisch's testimony above, when Trial Judge granted Mr. Poenisch's *ex parte* request for Plaintiff, and delayed the November 17, 2000, hearing to November 21, 2000, for Plaintiff's benefit, without Relator's prior knowledge and participation. The docket sheet recorded in relevant part:

> "11 7 00 Reset Hrg on all motions before 11/21/00 @ 1:30" (App., *infra*, 10a).

6. Trial Judge Advised on Defense Against Relator

The transcript shows that Trial Judge advised Plaintiff and Mr. Poenisch concerning the use of the statute of limitation as a defense against Relator:

> "THE COURT: .... If it's barred by limitations, that's certainly a defense that you have. I think that's what you were trying to tell me a while ago?
>
> MR. POENISCH: Yes, Judge. .... And the cases say that the third – that the defendant must use diligence to bring in a third party.... And it's been two years since between the time that the case was filed before she decided to bring me in as a party...." (SF. Vol. II, 2/27/2001, Defendant's Exhibit 1, p. 19-20).

The dialogue between Trial Judge and Mr. Poenisch, and the facts that Relator had requested a hearing for the third-party action since February 1, 2000 (App., *infra*, 31a); that Relator had again requested a hearing and specifically informed Trial Judge on May 11, 2000, that Relator had a time constraint under the statute of limitation for the third-party action (App., *infra*, 32a); that the hearing was not set until September 27, 2000; that the hearing was set for November 17, 2000; that Plaintiff's *ex parte* request was granted *ex parte* to delay the hearing to November 21, 2000,

evince that Trial Judge was interested in enabling Plaintiff and Mr. Poenisch to use the statute of limitation as a defense against Relator.

II. MANDAMUS IS WARRANTED BECAUSE ADMINISTRATIVE JUDGE'S DENIAL OF MOTION TO RECUSE WAS CLEAR ABUSE OF DISCRETION

The admitted evidence, which consists of the transcript of the November 21, 2000, hearing and the content of the court file, indisputably shows that Trial Judge had deprived Relator an opportunity to be heard, and was not impartial. Administrative Judge's finding that the motion to recuse was not supported by the evidence (App., *infra*, 1a) was clear abuse of discretion.

III. MANDAMUS IS WARRANTED BECAUSE RELATOR WILL HAVE NO ADEQUATE REMEDY BY APPEAL

In *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), this Court opined that where judicial prejudice exists, the remedy by appeal will be inadequate:

> "The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Id.* 255 U.S. at 36.

In *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L.Ed. 2d 267 (1972), this Court ruled that a statutory provision for the disqualification of interested or biased judges did not afford the petitioner a sufficient safeguard

under the Due Process Clause; and that it is of no constitutional relevance that the petitioner could later be tried *de novo* in another court, as the petitioner was entitled to an impartial judge in the first instance.

Relator was sued as the defendant. The Due Process Clause guarantees a defendant the opportunity to be heard, and to have an impartial judge. The evidence shows that Trial Judge had disregarded the Due Process Clause by denying Relator an opportunity to be heard, and by participating in the litigation against Relator. Relator will have no adequate remedy by appeal.

Relator had presented the due process violations before the state administrative judge, state appellate court, and Texas Supreme Court. Relator cannot obtain relief in any other form or in any other court.

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted.

K. MING ROSCHKE (*Pro Se*)
4500 Carter Creek Parkway, Suite 107
Bryan, Texas 77802-4464
(979) 691-8192

October 2, 2001

APPENDIX A

Cause No. 48,017-361

DENNIS MANN	)(	In The District Court of
	)(	
VS.	)(	Brazos County, Texas
	)(	
K. MING ROSCHKE	)(	361st Judicial District

ORDER ON MOTION TO RECUSE AFTER HEARING

On [Feb. 27] , 2001, came to be heard the Motion to Recuse filed pursuant to TRCP 18(a) in the above captioned cause. The Court has considered the Motion, all attachments thereto, and all evidence presented, all citations of authority and arguments of counsel. The court finds the motion is not supported by the evidence and:

Therefore, IT IS ORDERED that the Motion to Recuse be and is hereby:

DENIED

IT IS FURTHER ORDERED the Clerk of the Court shall forward a certified copy of this Order to:

Presiding Judge
Second Administrative Judicial Region of Texas
301 N. Main, 2nd Floor
Conroe, Texas 77301
Fax No. 936/538-8167

SIGNED this [27] day of [Feb.] , 2001.

/S/ OLEN UNDERWOOD
Judge Presiding

APPENDIX B

Petition for Writ of Mandamus Denied and Opinion filed April 3, 2001.

In The

Fourteenth Court of Appeals

NO. 14-01-00351-CV

IN RE K. MING ROSCHKE, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

OPINION

On March 29, 2001, relator K. Ming Roschke filed a petition for writ of mandamus in this Court. See TEX. GOV'T. CODE ANN. §22.221 (Vernon Supp. 2000); see also TEX. R. APP. P. 52. Relator's petition seeks to compel the entry of an order granting relator's motion for recusal of a trial judge. Under Rule 18a(f), TEX. R. CIV. P., the denial of a motion for recusal is to be reviewed for abuse of discretion on appeal from the final judgment. Relator has an adequate remedy at law, and mandamus would be improper. *In re Union Pacific Resources Company*, 969 S.W.2D 427 (Tex. 1998).

We deny relator's petition for writ of mandamus.

PER CURIAM

Petition Denied and Opinion filed April 3, 2001.

Panel consists of Justices Fowler, Yates and Wittig.

DO NOT PUBLISH – TEX. R. APP. P. 47.3(b).

APPENDIX C

THE SUPREME COURT OF TEXAS

Orders Pronounced May 30, 2001

MISCELLANEOUS

THE FOLLOWING PETITION FOR WRIT OF MANDAMUS IS DENIED:

01-413 IN RE K. MING ROSCHKE

as redrafted

motion for temporary relief denied

motion for leave to file amended motion for sanctions granted

motion for sanctions as amended denied

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

July 19, 2001

[Counsel's names and addresses]

RE: Case Number:01-0413
Court of Appeals Number: 14-01-00351-VC
Trial Court Number: 48,017 & 52,255-361

Style: IN RE K. MING ROSCHKE

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing in the above styled petition for writ of mandamus.

Sincerely,

John T. Adams, Clerk

By: /S/ PATRICIA A. COOK
Patricia A. Cook
Deputy Clerk

[cc: Clerks and Administrative Judge]

APPENDIX E

Texas Rules of Civil Procedure, Rule 38 provides in relevant part:

"RULE 38. THIRD-PARTY PRACTICE

(a) **When Defendant May Bring In Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action...."

APPENDIX F

Texas Rules of Civil Procedure, Rules 21, 21a, and 21b, provide in relevant part:

"RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

Every pleading, plead, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be fled with the clerk of the court in writing, shall state the grounds therefore, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket. ...."

"RULE 21a. METHODS OF SERVICE

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic number, or by such other manner as the court in its discretion may direct. ...."

"RULE 21b. SANCTIONS FOR FAILURE TO SERVE OR DELIVER COPY OF PLEADINGS AND MOTIONS

If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules 21 and 21a, the court may in its discretion, after notice and hearing, impose an appropriate sanction available under Rule 215-2b."

APPENDIX G

Texas Rules of Civil Procedure, Rule 13 provides in relevant part:

"RULE 13. EFFECT OF SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. ...."

APPENDIX H

Texas Rules of Civil Procedure, Rule 215.2(b) provides in relevant part:

"(b) *Sanctions by Court in Which Action is Pending.* .... the court in which the action is pending may, after notice and hearing, made such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

....

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust. ...."

APPENDIX I

Docket sheet from court file with entries made by handwriting:

CASE NO. 48,017-361

CIVIL DOCKET

[NAME OF PARTIES, ATTORNEYS]
[FILING DATE 10/6/98]

DATE OF ORDERS Month	Day	Year	ORDERS OF COURT
10	16	98	Signed Order for P/S
5	10	99	Telephone hrg on mtn to interplead funds into the registry of the court 5-24-99 @ 8:45 (10 mins)
5	24	99	Mr. Buecker called indicating parties have agreed to tender the funds into the court. Ordered. /s/ [a signature]
11	4	99	FPT 1-7-00 @ 10:30
			JT 1-10-00 @ 8:30 (2 ½ days)
12	29	99	Hrg on Δ's mtns 1-6-00 @ 10:30 (1 ½ hrs)
			Hrg on all motions before pending Court 11/17/00 @ 1:30
11	7	00	Reset Hrg on all motions before 11/21/00 @ 1:30

[REVERSE SIDE OF DOCKET SHEET]

DATE OF ORDERS Month	Day	Year	ORDERS OF COURT
11	21	00	heard motn as filed; rulings made; counsel to provide orders and in camera documents
12	28	00	referral order signed – materials sent to Judge Underwood
3	14	01	hrg on mtn to compel 4-20-01 @ 2:00 (1 hour)

APPENDIX J

[Relator's Letterhead]

May 5, 1999

Hon. Judge Steve Smith
361st District Court
Brazos County Courthouse
300 E. 26th Street, Suite 305
Bryan, TX 77803

Re: Cause No.: 48,017-361
Style: Dennis Mann v. K. Ming Roschke
Motion to Interplead Funds and Orders
Request for Joint Signatures by Both Parties
before Granting Order

Dear Judge Smith:

On May 24, 1999, after the scheduled 8:45 a.m. hearing, for the first time I was provided with a copy of Plaintiff's Motion to Interplead Funds into the Registry of the Court by Mr. Bernard Buecker via fax. K. Ming Roschke discovered that the motion contains incorrect information in that (1) K. Ming Roschke had never been asked to endorse the check, and (2) K. Ming Roschke was served with the motion only on May 24, 1999, via fax. A copy of the served motion, and a copy of my previous correspondence requesting a copy of the motion and proposed order are enclosed herein for the Court's reference.

Based on what had transpired, I would request the Court to enter agreed orders in this case only if the proposed order has been approved and signed by both parties.

I herein certify that a copy of this letter has been sent to Mr. Bernard Buecker via certified mail, return receipt requested, pursuant to Rule 21a.

Most respectfully,

/S/ K. MING ROSCHKE
K. MING ROSCHKE

KMR/ccp-dell

Enc.

Copy: Mr. Bernard Buecker, Certified Mail, R.R.R. Z 208 610 265

APPENDIX K

Relator's "motion one" in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

DEFENDANT AND CROSS-PLAINTIFF'S MOTION TO STRIKE AMENDED PETITION AND FOR SANCTIONS PURSUANT TO RULE 215 FOR VIOLATION OF RULE 21 AND RULE 13

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES K. MING ROSCHKE, movant and defendant and cross-plaintiff herein, and respectfully moves this Honorable Court to strike plaintiff and cross-defendant's amended petition and for sanctions pursuant to Rule 21, Rule 13, and Rule 215 of the Texas Rules of Civil Procedure, and in support movant shows:

I.

VIOLATIONS RE FILING OF PLEADINGS AND COMMUNICATION WITH THE COURT

On November 3, 1999, for the first time plaintiff and cross-defendant's counsel revealed to movant in a letter concerning discovery matters that plaintiff and cross-defendant had filed "Amended Petition for Declaratory Judgment and Damages" (herein after "the Amended Petition") on May 4, 1999, in this cause. As of the date of the filing of this motion, plaintiff and cross-defendant has not served movant with a true copy of the Amended Petition as required by Rule 21 of the Texas Rules of Civil Procedure.

II.

Movant has obtained a copy of the Amended Petition from the Brazos County District Clerk's Office. A copy of the Amended Petition is attached hereto as Exhibit A. Movant discovered that although the Certificate of Service in the Amended Petition stated that movant was served with a copy on April 27, 1999, movant had not been so served. The true fact is that on April 27, 1999, plaintiff and cross-defendant's counsel faxed an unsigned draft bearing the same title as the Amended Petition to movant. The draft as received by movant is attached hereto as Exhibit B.

III.

A comparison of what had actually been faxed to movant and what had actually been filed shows that the second page of the draft was different from the second page of the Amended Petition. A perusal of the faxed draft to movant and the filed Amended Petition reveals that the Certificate of Service was false and in violation of Rule 13 of the Texas Rules of Civil Procedure.

IV.

Movant had never been notified by plaintiff and cross-defendant that the Amended Petition was filed on May 4, 1999; and movant had never been provided with a true copy of the Amended Petition as filed, at the time of the filing, in violation of Rule 21.

V.

Movant further maintains that the totality of the circumstances indicates that plaintiff and cross-defendant's violation was committed habitually to deceive movant and the Court. Movant has found that at least the following pleadings and communication had been filed with the Court or the District Clerk's Office without movant's knowledge in violation of Rule 21:

(i) A faxed letter dated April 7, 1999, with cover sheet to the Court Coordinator,

requesting a hearing on Motion to Interplead Funds into the Registry of the Court (herein attached as Exhibit C). Movant was not notified by plaintiff and cross-defendant of such communication pursuant to Rule 21.

(2) A letter dated April 7, 1999, to the District Clerk's Office concerning the filing of Notice of Intent to Take Oral Deposition (herein attached as Exhibit D). Movant was not notified by plaintiff and cross-defendant of such communication pursuant to Rule 21.

(3) A letter dated April 9, 1999, to the District Clerk's Office concerning the filing of Motion to Interplead Funds into the Registry of the Court (herein attached as Exhibit E). Movant was not notified by plaintiff and cross-defendant of such communication pursuant to Rule 21.

(4) A motion to Interplead Funds into the Registry of the Court, which was filed with the District Clerk's Office on April 12, 1999 (herein attached as Exhibit F). Movant was not notified by plaintiff and cross-defendant of such filing pursuant to Rule 21.

(5) A letter dated April 29, 1999, to the District Clerk's Office concerning the filing of Amended Petition for Declaratory Judgment and Damages (herein attached as Exhibit G). Movant was not notified by plaintiff and cross-defendant of such communication pursuant to Rule 21.

(6) Amended Petition for Declaratory Judgment and Damages, which was filed with the Court on May 4, 1999 (herein attached as Exhibit A). Movant was not notified by plaintiff and cross-defendant of such filing pursuant to Rule 21.

VI.

Movant avers that plaintiff and cross-defendant's violation of Rule 21 and Rule 13 was purposeful for the reason that even though on May 13, 1999, movant had requested in a letter to plaintiff and cross-defendant's counsel to be notified of any writing filed with the Court pursuant to Rule 21a (a copy of movant's request letter is attached hereto as Exhibit H), plaintiff and cross-defendant knowingly ignored movant's request, and did not timely provide a true copy of the above items that had all been filed with the Court without movant's knowledge prior to movant's request letter of May 13, 1999.

VII.

As a result of plaintiff and cross-defendant's violation of Rule 21 and Rule 13 of the Texas Rules of Civil Procedure, movant had to obtain a true copy of the above documents from the District Clerk's Office for this motion.

VIII.

RULE 13 VIOLATION IN ANSWERS TO INTERROGATORIES

Movant further maintains that plaintiff and cross-defendant DENNIS MANN and his counsel violated Rule 13 also in his answers to movant's second set of interrogatories, for the reason that DENNIS MANN verified, and his counsel certified, that the maximum of 25 answers had been given when only 15 answers had been made. A copy of plaintiff and cross-defendant's answers to movant's second set of interrogatories is attached hereto as Exhibit I.

IX.

As a result of plaintiff and cross-defendant's violation of Rule 21 and Rule 13 of the Texas Rules of Civil Procedure, movant has to file this motion to inform the Court of the violations and enforce the rules.

X.

The amount of reasonable expenses and costs of lost time incurred by movant for obtaining a copy of the above documents, preparing this motion, obtaining and attending a hearing on the issue is $700.00.

XI.

WHEREFORE, PREMISES CONSIDERED, movant prays that plaintiff and cross-defendant DENNIS MANN and his counsel be cited to appear to show cause, and upon hearing, be sanctioned pursuant to Rule 21, Rule 13, and Rule 215 of the Texas Rules of Civil Procedure as follows:

1. That plaintiff and cross-defendant's Amended Petition for Declaratory Judgment and Damages, which was filed on May 4, 1999, without movant's knowledge, be stricken in its entirety, and that plaintiff and cross-defendant be prohibited to re-file any other amended petition;

2. That plaintiff and cross-defendant's cause of action be dismissed with prejudice;

3. That a judgment by default be rendered for movant and against plaintiff and cross-defendant;

4. That plaintiff and cross-defendant and his counsel be required to pay movant $700.00 for costs for violating Rule 21 and Rule 13 of the Texas Rules of Civil Procedure;

5. That plaintiff and cross-defendant and his counsel be held in contempt of court, and

6. That Plaintiff and cross-defendant and his counsel be sanctioned in any other way authorized by law in which the Court deems proper and just.

Respectfully submitted,

By /S/ K. MING ROSCHKE
K. MING ROSCHKE
Attorney for Defendant and
Cross-plaintiff
State Bar No. 17247300
4500 Carter Creek Parkway, Suite 107
Bryan, Texas 77802-4464
Telephone: (409) 691-8192
Fax: (409) 846-5225

[VERIFICATION]

[CERTIFICATION OF SERVICE]

[EXHIBITS]

APPENDIX L

Relator's "motion two" in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

DEFENDANT AND CROSS-PLAINTIFF'S MOTION TO RESET TRIAL DATE AND TIME ALLOTMENT AND FOR SANCTION PURSUANT TO RULE 215 RE VIOLATION OF RULE 21

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES K. MING ROSCHKE, movant and defendant and cross-plaintiff herein, and respectfully moves the Court to reset the trial date and for sanction against plaintiff and cross-defendant DENNIS MANN and his counsel, and in support, movant shows:

I.

On November 3, 1999, in a letter responding to movant's invitation to resolve discovery disputes without court intervention, for the first time plaintiff and cross-defendant's counsel informed movant that plaintiff and cross-defendant had filed an amended petition on May 4, 1999. Up to that point, movant had not been notified by plaintiff and cross-defendant of such filing. On November 3, 1999, plaintiff and cross-defendant, knowing that movant had not completed discovery, also did not inform movant that plaintiff and cross-defendant had requested a trial setting in this cause.

II.

On November 4, 1999, the Court issued a notice of setting, setting the trial date for January 10, 2000, for a 2-½ days trial. Before the Court issued the notice of setting, movant had no knowledge that plaintiff and cross-defendant had requested the

setting; and plaintiff and cross-defendant had not served a copy of the setting request upon movant, in violation of Rule 21 of the Texas Rules of Civil Procedure. As a result, movant was not given an opportunity to object or respond to the setting request.

III.

On November 10, 1999, upon receiving the Court's Notice of Setting, movant checked with the District Clerk's Office, and found that plaintiff and cross-defendant had requested the trial setting in writing by a letter. As of the date of the filing of this motion, movant has not received a copy of such request letter from plaintiff and cross-defendant.

IV.

From the history of this cause, plaintiff and cross-defendant's violation of Rule 21 was purposeful and habitual to deceive movant and the Court.

V.

Good cause exists to reset the trial date for the reason that plaintiff and cross-defendant had been resisting discovery, and movant had not yet completed her discovery due to plaintiff and cross-defendant's lack of cooperation.

VI.

Good cause exists to enlarge the time allotment for the trial for the reason that movant anticipates that at least two weeks would be required for proper adjudication of this cause.

VII.

As a result of plaintiff and cross-defendant's violation of Rule 21, movant has to inquire through the District Clerk's Office, and file this motion to inform the Court of the violation, and to reset the trial date and time allotment. The amount of reasonable expenses and costs of lost time incurred by movant for instituting this motion is $500.00.

WHEREFORE, PREMISES CONSIDERED, movant prays that the Court reset the trial date to allow time for movant to complete discovery, and reset the time allotment to allow at least two weeks for the trial of this cause, and that plaintiff and cross-defendant DENNIS MANN and his counsel be cited to appear to show cause, and upon hearing, be sanctioned pursuant to Rule 21, and Rule 215 of the Texas Rules of Civil Procedure as follows:

1. That plaintiff and cross-defendant's cause of action be dismissed with prejudice;

2. That a judgment by default be rendered for movant and against plaintiff and cross-defendant;

3. That plaintiff and cross-defendant and his counsel be required to pay movant $500.00 for costs for violating Rule 21 of the Texas Rules of Civil Procedure;

4. That plaintiff and cross-defendant and his counsel be held in contempt of court, and

5. That Plaintiff and cross-defendant and his counsel be sanctioned in any other way authorized by law in which the Court deems proper and just.

Respectfully submitted,
By /S/ K. MING ROSCHKE
K. MING ROSCHKE
Attorney for Defendant and
Cross-plaintiff
State Bar No. 17247300
4500 Carter Creek Parkway, Suite 107
Bryan, Texas 77802-4464
Telephone: (409) 691-8192
Fax: (409) 846-5225

[VERIFICATION]

[CERTIFICATION OF SERVICE]

APPENDIX M

Relator's "motion three" in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

[Relator's original answer, petition, counterclaims, verification, and certificate of service, exhibits, which are part of this pleading, have not been included for brevity.]

MOTION FOR SANCTION FOR FRIVOLOUS AND FRAUDULENT LAWSUIT

Defendant and cross-plaintiff further alleges, without waiving the forgoing, that plaintiff and cross-defendant and his attorney's conduct violated the Texas Civil Practice and Remedies Code, Section 10.001, in that plaintiff and cross-defendant and his attorney knew with full knowledge that the allegations in the Petition for Declaratory Judgment that "Respondent's acts of representation were client consultations and the referral of Petitioner to a chiropractor and a medical doctor. No other action was taken" are false and do not have evidentiary support as plaintiff and cross-defendant had in his possession, among other items, Exhibits A, B, C, and D, as herein attached, and that plaintiff and cross-defendant and his attorney knew with full knowledge that defendant and cross-plaintiff's acts of representation consisted of, among other things, reviewing numerous items of information and documents from plaintiff and cross-defendant, obtaining and reviewing numerous other items of information and documents from health-care providers and employer for plaintiff and cross-defendant, confirming the obtained information and documents, drafting and preparing the settlement packet of documentation for presentation for negotiation, negotiating for plaintiff and cross-defendant both by

correspondence and telephone, obtaining offers and making counter-offers for plaintiff and cross-defendant, conferring and consulting with plaintiff and cross-defendant and other parties directed by plaintiff and cross-defendant both by face to face conferences, correspondence, and the telephone.

Defendant and cross-plaintiff further alleges that plaintiff and cross-defendant knew of the above-mentioned allegations to be false as he was not only personally involved, but also had his entire file, as shown in part herein as Exhibits A and B, in his possession. A copy of plaintiff and cross-defendant's receipt of his entire file is attached hereto as Exhibit A. A copy of a substantial portion of plaintiff and cross-defendant's file that had been returned to plaintiff and cross-defendant, and which evidences the above-mentioned acts of representation is attached hereto as Exhibit B.

Defendant and cross-plaintiff further alleges, without waiving the forgoing, that plaintiff and cross-defendant and his attorney's conduct violated the Texas Civil Practice and Remedies Code, Section 10.001, in that plaintiff and cross-defendant and his attorney knew and should have known that the allegation in the Petition for Declaratory Judgment that "it appears that the only services rendered were consultation with Petitioner and referral to a chiropractor and a medical doctor" was false and groundless and does not have evidentiary support and that plaintiff and cross-defendant and his attorney has the entire file (as shown in part herein as Exhibit B) in their possession (as shown herein as Exhibit A) that evidences defendant and cross-plaintiff's effort and acts of representation.

Defendant and cross-plaintiff further alleges, without waiving the forgoing, that plaintiff and cross-defendant's conduct violated the Texas Civil Practice and Remedies Code, Section 10.001, in that plaintiff and cross-defendant knew that the allegation in the Petition for Declaratory Judgment that "Respondent (defendant and cross-plaintiff) terminated her relationship with Petitioner (plaintiff and cross-defendant) without

cause" is false, and groundless, and does not have evidentiary support, and that defendant and cross-plaintiff will show that the termination was demanded by plaintiff and cross-defendant on or about October 21, 1997, and that plaintiff and cross-defendant demanded a termination by an absolute ultimatum via defendant and cross-plaintiff's telephone answering recorder that his entire file with all its originals be returned to him the next day regardless of reasons and consequences. Plaintiff and cross-defendant knew and should have known that the above-mentioned allegation is false, groundless, and does not have evidentiary support.

Defendant and cross-plaintiff further alleges that plaintiff and cross-defendant's petition is groundless and is aimed to harass defendant and cross-plaintiff and injure her reputation.

As a result of plaintiff and cross-defendant and his attorney's conduct in violation of the Texas Civil Practice and Remedies Code, Section 10.001, defendant and cross-plaintiff has been forced to expend valuable attorney time in responding to the frivolous and fraudulent lawsuit, and in seeking this Motion for Sanction.

As a result, defendant and cross-plaintiff is entitled to sanctions under The Texas Civil Practice and Remedies Code, Section 10.002, including, without limitation, payment for reasonable expenses, and valuable attorney's time and/or attorney's fees, all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

WHEREFORE, PREMISES CONSIDERED, defendant and cross-plaintiff prays that plaintiff and cross-defendant and his attorney be directed by this Court to show cause, and upon hearing, the Court enter an order imposing sanctions on plaintiff and cross-defendant DENNIS MANN, or his attorney BERNARD BUECKER, or both.

[COUNTERCLAIMS, SIGNATURE, VERIFICATION, CERTIFICATE OF SERVICE, EXHIBITS]

APPENDIX N

Texas Civil Practice and Remedies Code, §10.001 and §10.002 provide:

"CHAPTER 10. SANCTIONS FOR FRIVOLOUS PLEADINGS AND MOTIONS

§ 10.001. Signing of Pleadings and Motions

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

§ 10.002. Motion for Sanctions

(a) A party may make a motion for sanctions, describing the specific conduct violating Section 10.001.

(b) The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section.

(c) The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation."

APPENDIX O

Relator's November 9, 1999, setting request is reproduced here in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

COURT HEARING SETTING REQUEST

TYPE OF SETTING REQUESTED:

(1) Defendant and Cross-plaintiff's Motion to Strike Amended Petition and for Sanctions Pursuant to Rule 215 for Violation of Rule 21 and Rule 13

(2) Defendant and Cross-plaintiff's Motion for Sanction for Frivolous and Fraudulent Lawsuit

TIME REQUESTED: 4 hours (Please set hearing immediately.)

REQUESTING ATTORNEY:

[Relator's name, address, and phone number]

ALL OTHER ATTORNEYS OR PARTIES ENTITLED TO NOTICE:

[Plaintiff's counsel, names, address and phone number]

DATE: November 9, 1999

/S/ K. MING ROSCHKE
K. MING ROSCHKE
State Bar No.: 17247300

[CERTIFICATION OF SERVICE]

APPENDIX P

Relator's November 12, 1999, setting request in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

COURT HEARING SETTING REQUEST

TYPE OF SETTING REQUESTED:

(1) Defendant and Cross-plaintiff's Special Exceptions, Plea in Abatement, and Plea in Bar

(2) Defendant and Cross-plaintiff's Motion to Reset Trial Date and Time Allotment and for Sanction for Pursuant to Rule 215 re violation of Rule 21

TIME REQUESTED: 3 hours (Please set hearing immediately.)

REQUESTING ATTORNEY:

[Relator's name, address, and phone number]

ALL OTHER ATTORNEYS OR PARTIES ENTITLED TO NOTICE:

[Plaintiff's counsel, names, address and phone number]

DATE: November 12, 1999

/S/ K. MING ROSCHKE
K. MING ROSCHKE
State Bar No.: 17247300

[CERTIFICATION OF SERVICE]

APPENDIX Q

Relator's January 11, 2000, setting request in relevant part:

[Relator's Letterhead]

January 11, 2000

Via Fax and Mail

Ms. Karen Wilke
Court Coordinator
361st District Court
Brazos County Courthouse
300 E. 26th Street, Suite 305
Bryan, TX 77803

Re: Cause No.: 48,017-361
Style: Dennis Mann v. K. Ming Roschke
Request for Preferential Setting for Pending Motions

Dear Karen:

Please allow a preferential setting for Defendant's pending motions as soon as possible.

Please also allow adequate time for each motion.

Thank you so very much.

Sincerely,

/S/ K. Ming Roschke
K. Ming Roschke

KMR/ccp

Copy: Attorneys Gary Poenisch and Bernard Buecker,
via fax: 210-227-2239

APPENDIX R

Relator's February 1, 2000, setting request in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

COURT HEARING SETTING REQUEST

TYPE OF SETTING REQUESTED:

(1) Motion for Leave to File Third-party Action

(2) Motion to Compel Verification of Answers to Interrogatories and for Sanction for Costs

TIME REQUESTED: 1 hour (Please set hearing immediately. [Note concerning Relator's schedule])

REQUESTING ATTORNEY:

[Relator's name, address, and phone number]

ALL OTHER ATTORNEYS OR PARTIES ENTITLED TO NOTICE:

[Plaintiff's counsel, names, address and phone number]

DATE: February 1, 2000

/S/ K. MING ROSCHKE
K. MING ROSCHKE
State Bar No.: 17247300

[CERTIFICATION OF SERVICE]

APPENDIX S

Relator's May 11, 2000 hearing request in relevant part:

[Relator's Letterhead]

May 11, 2000

Hon. Judge Steve Smith
361st District Court
Brazos County Courthouse
300 E. 26th Street, Suite 305
Bryan, TX 77803

Re: Cause No.: 48,017-361
Style: Dennis Mann v. K. Ming Roschke
Motion to Interplead Funds and Orders
Request for Immediate Hearing on Motion for Leave to File Third-party Action and Other Motions

Dear Judge Smith:

On February 1, 2000, I filed a Motion for Leave to File Third-party Action and requested a hearing. Enclosed is a copy of the motion and setting request for the Court's reference.

Because the third-party lawsuit must be filed within the time set by the statute of limitation, I have a time constraint and would appreciate it very much if the Motion for Leave to File third-party Action could be heard immediately.

In addition, I would also appreciate a preferential setting on the following pending motions, which are crucial to the defense:

[A list of all pending motions]

I would appreciate the Court's special allowance in the matter.

Pursuant to Rule 21, I certify that a copy of this letter has been simultaneously served upon Attorneys Gary M. Poenisch and Bernard Buecker via fax at (210) 227-2239 and by certified mail, Z 208 623 140, return receipt requested, at 310 South St. Mary's Street, Suite 2000, San Antonio, TX 78205.

Most respectfully,

/S/ K. Ming Roschke
K. Ming Roschke

KMR/nrd

Enc.

Copy: Court's file
Attorneys Gary M. Poenisch and Bernard Buecker
via fax at (210) 227-2239 and Certified Mail,
R.R.R. Z 208 623 140

[ENCLOSURE]

APPENDIX T

Relator's September 18, 2000, setting request in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

COURT HEARING SETTING REQUEST

TYPE OF SETTING REQUESTED:

Defendant and cross-plaintiff's motions as stated in the attached exhibit [a list of all pending motions was attached in an exhibit]

TIME REQUESTED: Please see the attached exhibit

REQUESTING ATTORNEY:

[Relator's name, address, and phone number]

ALL OTHER ATTORNEYS OR PARTIES ENTITLED TO NOTICE:

[Plaintiff's counsel, names, address and phone number]

DATE: September 18, 2000

/S/ K. MING ROSCHKE
K. MING ROSCHKE
State Bar No.: 17247300

[CERTIFICATION OF SERVICE]

[EXHIBIT]

APPENDIX U

Setting notice by trial court in relevant part:

Cause No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

NOTICE OF SETTING

THE ABOVE ENTITLED AND NUMBERED CAUSE IS SET FOR THE FOLLOWING:

All Motions Pending Before the Court November 17, 2000

1:30 P.M.

"Agreement to pass" will not be honored. Motions for continuance in compliance with the Texas Rules of Civil Procedure will be considered and must be set on the docket with a Request for Setting. Any motion for continuance, including "joint" motions, must state a reasonable ground for seeking a continuances, and be signed by the client or representative-other that the attorney, or state reasons why that is impossible. Conflicting settings of counsel will not be a reasonable ground unless the conflicting setting was given prior in time to this notice, and then counsel cannot necessarily except immediate relief from this setting.

Motions alleging a conflicting setting must include the following:

1. Copy of notice of conflicting setting attached.
2. Unless shown on notice:
    A. Number and style of case.
    B. Name of Court.
    C. Type of setting.
    D. Expected length of trial/hearing.
    E. Date of setting notice.

3. Name and telephone number of court coordinator, assignment clerk, or judge to contact for status of setting.

Date: September 27, 2000

By: Karen Wilkey
Court Coordinator
300 East 26th St., Suite 305
Bryan, Texas 77803
(409) 361-[4]380

COPIES TO:

K MING ROSCHKE
4500 CARTER CREEK PKWY
STE 107
BRYAN TX 77802-4464

GARY POENISCH & BERNARD BUECKER
2000 TOWER LIFE BUILDING
310 S ST MARY'S
SAN ANTONIO TX 77205

SCOTT HOOVER
113 SOUTH FOURTH ST
PADUCAH, KENTUCKY 42001

APPENDIX V

Texas Rules of Civil Procedure, Rule 18a provides in relevant part:

"RULE 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

....

(d). If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require. ...."

Texas Rules of Civil Procedure, Rule 18b provides in relevant part:

"RULE 18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES

(1) Disqualification. Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) Recusal. A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service; ...."

APPENDIX W

Relator's motion to recuse in relevant part:

No. 48,017-361

[Style of Case: Dennis Mann v. K. Ming Roschke; Name of Court]

MOTION TO RECUSE JUDGE

TO THE HONORABLE COURT:

NOW COMES K. MING ROSCHKE, movant and defendant and cross-plaintiff herein, and respectfully makes this Motion to Recuse Judge and in support of this motion shows:

I.

The Honorable Judge Steve Smith should be recused from further proceedings because his impartiality might reasonably be questioned in that the Judge has a personal bias or prejudice concerning the subject matter of the litigation, or movant, or both; and has shown favoritism for plaintiff to movant's prejudice. In this connection, movant will show the Judge's bias as follows:

II.

The Judge has Condoned All T.R.C.P. Rule 13 and Rule 21 Violations Committed by Plaintiff Depriving Movant of Due Process Right to Fair Notice

Specifically, on November 3, 1999, movant was informed by plaintiff's counsel GARY M. POENISCH that a new cause of action had been filed against movant on May 4, 1999. Since then, movant discovered that the following pleadings, letters, and communication had been filed with the Court without movant's knowledge and without a true copy to movant in violation of Rule 21 and Rule 13:

(1) Amended Petition for Declaratory Judgment and Damages filed on May 4, 1999, with Certificate of Service which was false;

(2) A faxed letter dated April 7, 1999, with cover sheet to the Court Coordinator, requesting a hearing on Motion to Interplead Funds into the Registry of the Court;

(3) A letter dated April 7, 1999, to District Clerk's Office re filing of Notice of Intent to Take Oral Deposition;

(4) A letter dated April 9, 1999, to the District Clerk's Office concerning the filing of Motion to Interplead Funds into the Registry of the Court;

(5) Motion to Interplead Funds into the Registry of the Court, which was filed with the District Clerk's Office on April 12, 1999, with Certificate of Service which was false.

(6) A proposed order received by District Clerk's Office on April 12, 1999, re Motion to Interplead Funds;

(7) A letter dated April 29, 1999, to District Clerk's Office concerning the filing of Amended Petition for Declaratory Judgment and Damages;

(8) A letter dated October 25, 1999, to the Court Coordinator concerning request for a trial date; and

(9) Motion to Set for Hearing filed on October 29, 1999, with Certificate of Service showing a copy was faxed to movant's telephone number – plaintiff had to know that movant would not receive a copy.

The above Rule 21 and/or Rule 13 violations were brought to the attention of the Judge by two motions dated November 9, 1999, and November 12, 1999. Such motions were scheduled to be heard on November 21, 2000. Yet, at the time when the motions were to be heard, the Judge disallowed movant to present the motions, and expressly approved and condoned the above violations depriving movant of the right to due process: fair notice and fair hearing.

The Judge's approval of plaintiff's violation of Rule 13 and Rule 21 for the May 4, 1999, amended petition has particularly prejudiced movant, as movant was not given fair notice pursuant to Rule 21 within the time as required by the statute of limitation.

III.

The Judge Consistently Condoned and Granted Plaintiff's Ex Parte Requests to Movant's Disadvantage

On May 24, 1999, plaintiff's counsel BERNARD BUECKER caused an ex parte communication with the Court without movant's knowledge and obtained an ex parte order from the Court without a hearing. On May 25, 1999, movant expressly requested the Honorable Steve Smith not to enter further orders without movant's knowledge or joint signature.

On November 7, 2000, an ex parte communication was made by plaintiff's counsel GARY M. POENISCH, requesting a continuance for the hearing on movant's motions from November 17, 2000, to November 21, 2000. The communication was without movant's knowledge and the request was granted ex parte without a hearing. That same afternoon, Movant received a faxed letter from the Honorable Steve Smith dated November 7, 2000, resetting firmly the hearing to November 21, 2000, at plaintiff's convenience and without any input from movant as to movant's schedule.

IV.

The Judge Consistently and Promptly Granted Plaintiff's Requests

On October 25, 1999, plaintiff's counsel requested a setting without movant's knowledge in violation of Rule 21. The setting was given in less than 10 days: on November 4, 1999.

On January 3, 2000, plaintiff's counsel GARY M. POENISCH induced an agreement for continuance from movant agreeing to reset the hearing for movant's motions for January 19, 20, and 21, 2000. The agreement was approved.

On January 10, 2000, GARY M. POENISCH sent a letter to the Court to repudiate the above agreement and requested the Court not to set any hearing for movant's motions. The request was allowed without a hearing, despite the parties' written agreement which had been presented as part of the motion for continuance that movant's motions were to be reset to be heard around January 19, 20, and 21, 2000. No resetting was given for movant's motions.

On November 7, 2000, GARY M. POENISCH contacted the Court ex parte, requesting a continuance of the November 17, 2000, hearing to November 21, 2000; the ex parte request was granted without a hearing.

V.

The Judge Consistently Ignored Movant's Requests for a Hearing

On January 5, 2000, after GARY M. POENISCH had induced an agreement for a continuance from movant by agreeing to reset movant's motions to around January 19, 20, and 21, 2000, movant requested the Court to reset the hearing as soon as possible. No resetting was given.

On January 11, 2000, movant requested the resetting again. No resetting was given.

On February 1, 2000, movant requested a hearing for Motion for Leave to File Third-Party Action and Motion to Compel. No hearing was set.

On May 11, 2000, movant informed the Court by a letter requesting a hearing as soon as possible because of the time constraint imposed by the statute of limitation. No hearing was set.

On June 5, 2000, Movant had to serve the third-party defendants without the benefit of a court hearing.

On September 18, 2000, movant again requested a hearing for the pending motions. On September 27, 2000, the Court set

"All Motions Pending Before the Court" to be heard on November 17, 2000.

On November 7, 2000, through an ex parte request from GARY M. POENISCH to reset the hearing to November 21, 2000, the Court granted the request without a hearing and without any input from movant, resetting the hearing to November 21, 2000.

On November 21, 2000, at the scheduled hearing to hear all pending motions, movant was not allowed to present three motions, which had been pending since November, 1999, and for which a hearing had been requested since November, 1999.

VII.

The Judge Showed Favoritism for Plaintiff to Movant's Prejudice

The November 21, 2000, hearing was set for hearing "All Motions Pending Before the Court." Adequate time had been requested by movant. The hearing was set for 1:30 p.m. This cause appeared to be the only cause set for a hearing on the docket that afternoon. However, at the hearing, the Judge disallowed movant to present three of the listed motions and ruled that the three motions would not be heard.

The Judge however proceeded to receive all evidence and exhibits from plaintiff but prevented movant from presenting any evidence with the exception of one brief telephone message.

At the hearing, the Judge expressed antagonism toward the subject matter of the litigation and movant, and showed favoritism toward plaintiff's counsel approving their violations of Rule 13 and Rule 21 to movant's prejudice.

Movant had not been given due process and a fair hearing in this cause by the Judge.

VIII.

No trial or hearing in this cause has been set at this time. This motion is being filed at least 10 days before any setting date.

WHEREFORE, movant prays that prior to any further proceedings in this case, the Honorable Judge Steve Smith either recuse himself and request that the appropriate presiding Judge of the appropriate Administrative Judicial District assign another Judge to sit in this case, and hear this motion. Movant further prays for such other and further relief to which movant may be justly entitled.

Respectfully submitted,

By /S/ K. MING ROSCHKE
K. MING ROSCHKE
Attorney for Defendant and
Cross-Plaintiff
State Bar No. 17247300
4500 Carter Creek Parkway, Suite 107
Bryan, Texas 77802-4464
Telephone: (979) 691-8192
Fax: (979) 846-5225

[VERIFICATION]

[CERTIFICATION OF SERVICE]